United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

To be argued by:
Eugene Welch

Docket No. 75-1201

B
P/S

IN THE
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

—*v*—

FRANK S. CANNONE, STANLEY A. RAPPUCCI, THOMAS A. GAETANI, JON N. ENGLISH, JOSEPH N. MARUCA, VINCENT N. CHRISTINA, ANTHONY R. SANTACROSE, JR., RAYMOND D. MASCIARELLI, JAMES W. McGRATH, ANDREW J. QUINLAN and THOMAS A. ABBADESSA,

Appellees,

—and—

UNITED STATES OF AMERICA,

Appellant,

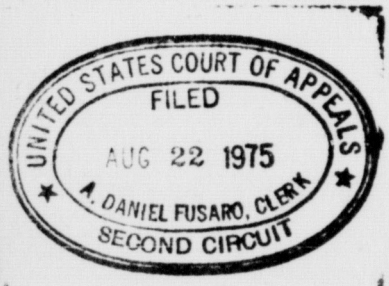
—*v*—

RAYMOND D. MASCIARELLI and LAWRENCE SCHULTZ,

Appellees.

On appeal from the United States District Court
Northern District of New York

SUPPLEMENTAL BRIEF FOR APPELLANT,
United States of America.



JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York

EUGENE WELCH
Assistant United States Attorney
Federal Building
Syracuse, New York 13201
(315) 473-6660

Attorneys for Appellant.

Daily Record Corporation
Rochester, New York

(7487)

Spaulding Law Printing
Syracuse, New York

2

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

—v—

FRANK S. CANNONE, STANLEY A. RAPPUCCI, THOMAS A. GAETANI, JON N. ENGLISH, JOSEPH N. MARUCA, VINCENT N. CHRISTINA, ANTHONY R. SANTACROSE, JR., RAYMOND D. MASCIARELLI, JAMES W. McGRATH, ANDREW J. QUINLAN and THOMAS A. ABBADESSA,

Appellees.

—and—

UNITED STATES OF AMERICA,

Appellant,

—v—

RAYMOND D. MASCIARELLI and LAWRENCE SCHULTZ,

Appellees.

On appeal from the United States District Court
Northern District of New York

SUPPLEMENTAL BRIEF FOR APPELLANT,
United States of America.

PRELIMINARY STATEMENT

This is a supplemental brief submitted by the government in support of its appeal from a district court order requiring the pre-trial disclosure of the names and addresses of the witnesses it intends to call in the presentation of its case in chief at the criminal trial of the defendant-appellees herein. This brief is submitted to supplement

the government's brief previously filed herein. Since the government's initial brief was prepared, the United States Congress has acted upon proposed amendments to the Federal Rules of Criminal Procedure. This supplemental brief will be limited to a discussion of this recent, intervening Congressional activity as it affects the issues herein.

The history of the case and the relevant facts are fully set forth in the government's initial brief. Since that brief was written, however, Congress has acted upon the proposed amendments to the Federal Rules of Criminal procedure, specifically deleting that part which had proposed adding to Rule 16, a specific provision for the disclosure of the government's witnesses upon defense demand (Proposed R 16(a)(1)(E), 62 FRD 305 (1974)) with an opportunity for the government to seek a district court protective order limiting that discovery (Proposed R 16 (d)(1), 62 FRD 307 (1974)); see 121 CONG. REC. H 7681 (daily ed. July 28, 1975); 17 CrL 3215, 3216 (Aug. 6, 1975). The government has set forth in its supplemental appendix relevant portions from 2 days of Congressional Record. The July 28, 1975 Congressional Record contains material that can also be found in the Criminal Law Reporter, 17 CrL 3215 (August 6, 1975).

When writing its initial brief, the government argued that even if that proposed R 16(a)(1)(E) became effective it would still vest the district court with discretion to deny discovery if the opposing party made a sufficient showing and therefore the question raised in the Government's third point, was it an abuse of discretion, would still have to be answered.

Congress specifically deleted that discovery provision with some strong statements in the legislative history as to why it did so. This Congressional action and these strong statements make it all the more clear now that the district court was not and is still not authorized to compel pre-trial discovery of the Government's witnesses in pre-trial motions.

ARGUMENT.

THE DISTRICT COURT HAS NO AUTHORITY TO ORDER THE PRE-TRIAL DISCLOSURE OF THE GOVERNMENT'S WITNESSES.

In its initial brief the government argued that if Congress or the draftsmen of the Federal Rules had intended that courts should have the authority to order discovery of the government's witnesses in non-capital cases they could have so stated in the rules or statutes. That they had not so provided, the government argued, is an indication they intended such things to be nondiscoverable.

This position has now been strongly reinforced by Congress when it specifically deleted proposed R 16(a)(1)(E) which would have provided for such discovery, 121 CONG. REC. H7681 (daily ed. July 28, 1975); 17 CrL 3216 (August 6, 1975). Further, the JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE clearly states that by deleting that proposed section they were "thereby making the names and addresses of a party's witnesses nondiscoverable". 121 CONG. REC. H 7683 (daily ed. July 28, 1975); 17 CrL 3218 (August 6, 1975).

The Conference Committee explains why it did this:

> A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

121 CONG. REC. H 7683 (daily ed. July 28, 1975); 17 CrL 3218 (August 6, 1975).

On July 30, 1975, Senator John L. McClellan who was one of the Senate Floor Managers of this legislation, spoke strongly in support of its enactment. He made it clear that the policy choice was directly presented and positively resolved by the conferees in favor of protecting witnesses by maintaining their anonymity until the last possible moment. This legislation should be understood as congressional disapproval of the type of order which the government is appealing herein. Senator McClellan said:

> Although it should be obvious, I want to emphasize that the policy choice was directly presented and positively resolved in favor of affording all possible protection and encouragement to witnesses in Federal criminal cases. This includes the ability of the prosecutor to assure a reluctant or fearful witness that his identity will not be divulged to the defendant prior to appearance at trial. Although there may be unusual cases involving fundamental fairness, the congressional decision on this issue should be taken as clear disapproval of the exercise of so-called inherent power by the courts to fashion local rules or individual orders calling for discovery of witnesses, see, for example, United States v. Jackson, 508 F.2d 1001, 1006 (7th Cir. 1975) and cases cited therein, except insofar as such discovery may be required to effectuate a party's right to constitutional due process of law.

121 CONG. REC. S 14301 (daily ed. July 30, 1975). (See Supplemental Appendix for Appellant.) The government submits that this statement is highly significant and should be weighted heavily. It is a statement by the Senate Manager of this legislation and it resulted in the enactment of this legislation which specifically deleted the Supreme Court's proposal to provide witness discovery.

This clear congressional statement leaves no doubt that Congress disapproves of the only circuit court opinion which has held that a district court has the authority to order the pre-trial disclosure of the government's witnesses. It is one more reason, in addition to those set forth in the government's initial brief, why this Court should reject the Seventh Circuit's approach in United States v. Jackson, 508 F.2d 1001 (7th Cir. 1975).

This Congressional activity at the end of July, 1975 should make it clear that the district court does not have the authority to order the pre-trial disclosure of all the government's witnesses in a non-capital case. Only one Circuit Court, the Seventh, has considered this question with any care and its ruling has been specifically disapproved by Congress. This question is now squarely before this Second Circuit and the Government submits this Court should confirm that Congress has made it clear, that absent an unusual case rising to the level of protecting constitutional due process, the district court cannot compel pre-trial discovery of the government's witnesses.

The Supreme Court, by its rule making authority, attempted to provide authority for pre-trial disclosure of witnesses by its proposed amendments to the Federal Rules of Criminal Procedure. This was done for the obvious reason that there is genuine doubt about whether a district court had that inherent authority previously. Through the orderly processes of law the Congress took action deleting that proposed provision which would have created the right of discovery and the district court's authority to enforce it. This Congressional action, therefore, must be seen as affirmative legislation removing from the realm of "inherent authority" any power in the usual case to order pre-trial disclosure of the government's witnesses. This is clear not only from the legislation but from the legislative history cited

above as well. Congress did not just overlook the question. Congress considered it carefully and then said it does not believe such discovery is in the interest of justice and is therefore not going to allow it. This is the strongest indication of Congressional intent there could be, short of a positive statutory prohibition against witness list discovery such as the Jencks Act prohibition of pre-trial discovery of witness statements, 18 U.S.C. 3500. In view of the posture in which this question of witness lists reached this Congress, such a statutory prohibition was not then appropriate. But the deletion of this proposed rule was a clear Congressional denial of witness list discovery.

This Court now has the opportunity to make the law in this Circuit clear that the district court exceeds it authority in ordering pre-trial disclosure of all the government's witnesses.

CONCLUSION.

On the basis of the arguments and law set forth in the government's initial brief as well as the arguments set forth in this supplemental brief and in view of the clearly stated Congressional intent to make witness lists non-discoverable the government-appellant respectfully submits that this Court should reverse the District Court's orders of March 11 and May 1, 1975, or, in the alternative, issue a Writ of Mandamus compelling the District Court, the Honorable Edmund Port, to vacate those orders and issue a new order denying the discovery of the government's witnesses.

Respectfully submitted,

JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York
Federal Building
Syracuse, New York 13201
(315) 473-6660

EUGENE WELCH
Assistant United States Attorney
Northern District of New York
Of Counsel

Records and Briefs for State and Federal Courts

SPAULDING LAW PRINTING CO. ESTABLISHED 1881

313 MONTGOMERY STREET • SYRACUSE, N.Y. 13202 • PHONE AC 315 HA2 4805

RUSSELL D. HAY, owner

AFFIDAVIT OF SERVICE

RE: U.S.A. v. FRANK S. CANNONE, et al.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

EVERETT J. REA , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of JAMES M. SULLIVAN, JR., United States Attorney, Attorney for Appellant,

he personally served two (2) copies of the printed ~~[Record]~~ [Brief] Supplemental , and one (1) copy of Supplemental [Appendix] of the above-entitled case addressed to:

REMO A. ALLIO, ESQ.
19 Washington Ave.
Endicott, N. Y. 13760

HAROLD J. BOREANAZ, ESQ.
736 Brisbane Bldg.
Buffalo, N. Y. 14203

MICHAEL J. DeSISTI, ESQ.
101 Hayden St.
Sayre, Pennsylvania 18840

DANTE M. SCACCIA, ESQ.
300 Wilson Bldg.
306 S. Salina St.
Syracuse, N. Y. 13202

JAMES P. SHANAHAN, ESQ.
424 University Bldg.
Syracuse, N. Y. 13202

by depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York on August 21, 1975.

Everett J. Rea

Everett J. Rea

Sworn to before me this 21st
day of August , 1975.

Russell J. Moloughney
Commissioner of Deeds

cc: James M. Sullivan, Jr., Esq.

AFFILIATED WITH
DAILY RECORD CORP.
ROCHESTER, N. Y.